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Rio Algom Corporation v. Jimco Ltd et al : Brief of Defendants-Respondents

Utah Supreme Court

Clinton D. Vernon; Clifford L. Ashton; Attorneys for Defendants-Respondents;
James S. Lee; Kent W. Winterholler; Attorneys for Plaintiff-Appellant;

IN THE SUPREME COURT OF THE STATE OF UTAH

RIO ALGOM CORPORATION, Plaintiff-Appellant, v. JIMCO LTD., HUMECA EXPLORATION COMPANY, JIM L. HUDSON, JUANITA J. MEYER AS EXECUTRIX OF THE ESTATE OF DANIEL H. MEYER, ELDON J. CARD, NORMA HUDSON, JEAN L. CARD, JUANITA J. MEYER, N. J. WHITE, AUDREY WHITE, WILMA WHITE, OTIS DIBLER, DOROTHY MAE DIBLER, GRACE DAVIS and MARLOWE C. SMITH, Defendants-Respondents.	No.

BRIEF OF JIMCO DEFENDANTS-RESPONDENTS

Appeal from an Order of the
Third Judicial District Court of
Salt Lake County, State of Utah
Honorable Dean E. Conder, Judge

JAMES B. LEE
KENT W. WINTERHOLLER
PARSONS, BEHLE & LATIMER
79 South State Street
P. O. Box 11898
Salt Lake City, Utah 84111

Attorneys for Plaintiff-
Appellant Rio Algom
Corporation

CLINTON D. VERNON
415 Kearns Building
Salt Lake City, Utah

CLIFFORD L. ASHTON
E. SCOTT SAVAGE
VAN COTT, BAGLEY, CORNWALL
& McCARTHY
141 East First South
Salt Lake City, Utah

Attorneys for Jimco
Defendants-Respondents

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KENT W. WINTERHOLLER
PARSONS, BEHLE & LATIMER
79 South State Street
P. O. Box 11898
Salt Lake City, Utah 84111

Attorneys for Plaintiff-
Appellant Rio Algom
Corporation

CLINTON D. VERNON
415 Kearns Building
Salt Lake City, Utah 84101

CLIFFORD L. ASHTON
E. SCOTT SAVAGE
VAN COTT, BAGLEY, CORNWALL
& McCARTHY
141 East First South
Salt Lake City, Utah 84111

Attorneys for Jimco
Defendants-Respondents

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STATEMENT OF THE NATURE OF THE CASE

These respondents believe the following explanation, most of which is quoted from appellant's Complaint, is a more informative and accurate statement of the nature of this case than the statement set forth in appellant's brief.

In the appellant's own words, it instituted this interpleader action "[b]ecause of the varying positions asserted . . . by each group of defendants plaintiff is unable to calculate its royalty obligation . . . ." The group subsequently

identified in this brief as the Audrey Respondents exercised an election to have their royalties computed on the basis of the fair market value of crude ore rather than the sales price of a yellowcake which is a more refined product. Since the Audrey Respondents' royalty is to be paid before any royalty is paid to the group identified in this brief as the Jimco Respondents and since there is a maximum royalty for which the appellant is obligated, certain methods of determining a royalty based upon the Audrey Respondents' election could dramatically reduce and even eliminate any royalty to the Jimco Respondents. The appellant sought from the court a declaration "as to the basis for calculating plaintiff's royalty obligations" as a result of the Audrey Respondents' election. Appellant asserted in its Complaint that it was "willing and able to make the royalty payments it is obligated" to make at "such times as a construal of the terms of both agreements provide plaintiff with a basis for calculating said royalty obligations." (R. 6).

DISPOSITION IN THE LOWER COURT

After literally years of litigating the issue of what division of royalties should be made between the Jimco Respondents and the Audrey Respondents, if and when the latter were allowed to compute their royalties on the basis of the fair market value of crude ore, these respondents agreed upon a settlement. This litigation was triggered, if not necessitated,

by the Audrey Respondents' "election" to cease having their royalty determined on the basis of the sales price of yellowcake (U_3O_8) which was the only uranium product actually sold from this property, and begin having their royalty determined on the basis of the market value of crude ore, something not sold from the property. Because of the difficulty, indeed the litigation, created by attempts to determine what this uranium would be worth if and when it were sold as crude ore rather than refined yellowcake, the Audrey Respondents agreed, as part of the settlement to return to a computation of their royalty on the basis of yellowcake actually sold. In return for this, the Jimco Respondents agreed to give the Audrey Respondents some of the Jimco royalty interest, which was also computed on the basis of yellowcake actually sold from the property. Since this was an interpleader action, and all defendants had now settled their differences, it initially appeared that this settlement would end the litigation based upon the Complaint. Litigation based upon Counterclaims, if not otherwise resolved, would remain.

Shortly before the execution of the Settlement Stipulation, the Jimco and Audrey Respondents were informed that the appellant (plaintiff) would oppose and attempt to block the settlement. Being thus advised, the respondents expressly made their settlement contingent upon the court determining that by settling pursuant to the agreed upon terms they would

not give rise to any cause of action in favor of the appellant. The appellant, making good its threat, moved to amend its Complaint away from interpleader to assert various causes of action which it claimed arose by reason of the proposed settlement. At about the same time, the respondents moved the court to approve the Settlement Stipulation and declare, as a matter of law, that no cause of action in favor of appellant arose by reason of the agreement. Numerous briefs were filed and oral argument was extensively presented on more than one occasion.

This appeal is from the Order entered by Judge Dean E. Conder, of the Third Judicial District Court of Salt Lake County, ruling that appellant has no right based upon either the Audrey Lease or the Jimco Agreement, or based upon any other theory of law or equity, to challenge or otherwise bar the effectuation or implementation of the Settlement Stipulation executed by the Audrey Respondents and the Jimco Respondents; that such settlement is not in violation of any duty owed to appellant by any of the respondents; and that effectuation and implementation of the Settlement Stipulation effectively and totally dismisses the Audrey Respondents from this litigation; and dismissing the amended complaint filed by appellant after the execution of the Settlement Stipulation.

RELIEF SOUGHT ON APPEAL

The Jimco Respondents seek to have the Order of the district court affirmed in its entirety.

IDENTITIES OF THE PARTIES

1. Rio Algom Corporation

Rio Algom Corporation (hereinafter "appellant" or "Rio"), plaintiff-appellant in this matter, is a Delaware corporation, incorporated on February 9, 1968, and qualified to do business in Utah as of sometime in December, 1968. It was formed for the specific purpose of developing certain properties under assignments from the Jimco Respondents of their leasehold rights. (R. 1639). Rio is a wholly owned subsidiary of Atlas Alloys, Inc. which is a wholly owned subsidiary of Rio Algom Limited, of Toronto, Ontario, Canada.[1/] (R. 1638). The records of the Utah Secretary of State disclose that at the time Rio qualified to do business in Utah, all of its officers and directors (except two attorneys who live in New York City) were officers and/or directors or employees, of Rio Algom Limited. The address of each of the officers and directors of the plaintiff (with the two previously noted exceptions) was

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[1/] Rio is not the corporation that executed the Amended Audrey Lease and the Rio-Jimco Option Agreement. Those documents were executed by Rio Algom Corporation, an Ohio corporation, and also a wholly owned subsidiary of Rio Algom Limited. The parent corporation subsequently changed the name of the Ohio corporation and conferred the name Rio Algom Corporation upon the appellant.

given as "c/o Rio Algom Mines Limited, 120 Adelaide St., W., Toronto, Canada, Ontario."

For many years George R. Albino, president and chief operating officer of the parent corporation, Rio Algom Limited, was also the appellant's president. Mr. Albino, formerly a citizen of the United States, is now a citizen of Canada. (R. 1638).

2. Audrey Lessors -- Audrey Respondents

In 1964, the Audrey Lessors consisted of the last seven persons named as defendants in the Complaint, or their predecessors in interest. On February 28, 1964, those Audrey Lessors leased the Audrey claims to a predecessor of the Jimco Respondents. (R. 13). Sometime in January, 1968 Rio purchased 25% of the Audrey Lessors' interest. The term "Audrey Respondents" is used to identify those Audrey Lessors who own the remaining three quarters of the Audrey interest. The term "Audrey Respondents" does not include Rio.

3. Jimco, Ltd. -- Jimco Respondents

Jimco, Ltd. is a limited partnership with more than 100 limited partners. The limited partners are the persons who contributed money to finance drilling of the Audrey claims by Jim L. Hudson, Daniel H. Meyer and Eldon J. Card (the General Partners of Jimco, Ltd.). Upon his death, Mr. Meyer's interest was acquired by his wife, Juanita J. Meyer. Except for certain reserved royalty interests, all of the leasehold

interests in the Audrey claims held by the aforementioned contributors and all other predecessors of Jimco, Ltd., were assigned to that limited partnership. The partnership later assigned them to Rio, subject to the terms and provisions of a written agreement known as the Rio - Jimco Option Agreement.

The term "Jimco Respondents" is used in this brief to identify the owners of all Jimco interests except those held by Rio. For convenience, and except where otherwise indicated, the term "Jimco Respondents" includes all of Jimco's predecessors in interest.

PREFACE TO STATEMENT OF FACTS

The Jimco Respondents cannot accept Rio's "Statement of Facts" for the reason that it is argumentative, inaccurate, and misleading. The following items are particularly troublesome:

1. Rio ignores the "Original" Audrey Lease, dated February 28, 1964. (R. 9, 13, 16).

2. Rio presents an abbreviated and misleading summary under the heading "Relationship of the Parties."

3. Under the heading "Pertinent Royalty Provisions", Rio does not quote from the basic royalties in the Amended Audrey Lease and inaccurately describes the effect of those royalties. From Rio's discussion one would not learn that they provide: (a) in the event crude ore is sold, the lessor royalty will be "eight per cent (8%) of the 'Sales Price' . . .

received by Lessee from the sale of all ores mined . . ." and (b), in the event Lessee produces from the ore uranium compounds, the Lessor royalty will be "four per cent (4%) of the 'Gross Value' of such compounds . . ." (Paragraphs 3.1(a) and 3.1(b) of the Amended Audrey Lease).

4. Under the same heading Rio makes the following self-serving and to some extent misleading statements:

> "[T]he Audreys and Rio reserved the right in the Amended Audrey Lease to have those royalties based on eight percent of the fair market value of crude ore produced from the claims, in lieu of the four percent royalty . . . ." (Brief of App. at 4) (emphasis supplied).

Since only the Audrey Respondents had the power to exercise the option, the right was only "reserved" for them, even though the exercise of their right would affect Rio.

> "Rio delegated the election decision to the Audreys . . . . (Brief of App. at 5) (emphasis supplied).

In fact, Rio bargained this away.

> "In June, 1968, Rio and the Audreys entered into an Agreement leasing these claims to the Jimcos." (Brief of App. at 3) (emphasis supplied).

Rio did not become a lessor until January of 1968 (about 6 months before the Amended Audrey Lease was executed), when it purchased a 25% lessor interest. About 18 months before Rio purchased a 25% lessor interest, it had acquired a valid option to obtain an assignment from the Jimco Respondents of the leasehold interest under the "Original" Audrey Lease and any amendment of that lease. While Rio was in fact the owner of

a lessor interest when it executed the Amended Lease, it had, prior to that time, become the real lessee by virtue of the fact that it had exercised the option to acquire the lessee interest, a fact which was acknowledged in several provisions of the Amended Audrey Lease. It is also evident that the Amendment of the "Original" Audrey Lease was chiefly for the benefit of Rio in its role as lessee.

5. Rio treats "Royalties Under the Rio-Jimco Option Agreement" with a light brush and in a hypothetical manner and then draws unjustified conclusions therefrom. (Brief of App. at 4).

6. Rio's "factual" discussion of the Settlement Stipulation (Brief of App. at 10-13) includes argument, contentions, and conclusions, one of which is the following:

> Rio contends that this too directly violates its rights under the Audrey Lease because under that lease Rio always received twenty-five percent of the 'Audrey royalty pie', whereas under the new arrangement Rio will receive one percent of yellowcake while Audrey will receive 5.5 percent of yellowcake -- effectively reducing Rio's percentage of the so-called royalty pie from twenty-five percent to 15.3 percent. (Brief of App. at 11-12).

This contention will be more extensively dealt with in the "Preface to Argument" section of this brief. However, since this contention is included in Rio's "Statement of Facts", one observation is appropriate at this time. If the Jimco Respondents take 2.5% from their own "royalty pie" and give it to the Audrey Respondents in order to settle differences between

them, the Audrey "pie" remains completely unchanged.

STATEMENT OF FACTS

1. The "Original" Audrey Lease

In February of 1964, the Audrey Respondents leased the Audrey claims to a predecessor of the Jimco Respondents.[2/] At that time, there had been no discovery on the unpatented claims. The lease provided for a lessor's royalty of "[e]ight per cent (8%) of the gross milling and . . . smelting receipts for the ore less the cost of hauling, transportation, milling and processing." It also provided that the lessee should "drill a test hole . . . to the Shinarump formation to ascertain the uranium values." In compliance with this requirement, the Jimco Respondents raised approximately $190,000.00 from persons who later became limited partners in Jimco, Ltd. and drilled 6 holes on the Audrey claims, some of which were drilled to a depth of 2500 feet. Uranium mineralization was discovered by the Jimco Respondents, and they started negotiations with a number of companies for development of the properties. Such negotiations ultimately were commenced with representatives of Rio Algom Limited, of which the Appellant Rio

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[2/] The lessee of the "Original" lease was a corporation, Pacific-Associated Oil and Gas Company, all the stock of which was owned by Daniel H. Meyer. All rights held by said corporation were acquired by the Jimco Respondents.

is a wholly owned subsidiary.

2. Letter Agreements of July 14 and November 30, 1966

After many months of negotiations, two letter agreements were executed by representatives of wholly owned subsidiaries of Rio Algom Limited and the Jimco Respondents by the terms of which exploration and purchase options were granted to the Rio Algoms.[3/] After completion of a drilling program, but before execution of the Amended Audrey Lease, the purchase option was exercised by one of the Rio Algoms and Rio became entitled to an assignment from the Jimco Respondents of their leasehold rights, subject to the terms and conditions of the Rio-Jimco Option Agreement. (R. 11, 78, 79).

3. The Amended Audrey Lease

The basic royalties of the Amended Audrey Lease are set out in Paragraph 3.1, which provides as follows:

> (a) In the event Lessee shall mine or extract ore from the Audrey Group which is sold in its raw or crude form Lessee shall pay Lessors a royalty equal to eight per cent (8%) of the 'Sales Price' (as hereinafter defined) received by Lessee from the sale of all ores mined, produced and sold in the crude form from the Audrey Group. . .
>
> (b) In the event Lessee shall mine or extract ore from the Audrey Group and recover therefrom for sale or use in commercial quantities any of the minerals contained in such ore, and if the minerals

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3/ Because a number of wholly owned subsidiaries of Rio Algom Limited were involved at one stage or another of the negotiations, and in the actual execution of documents, this brief will utilize the term "Rio Algoms" to mean Rio Algom Limited or one or another of its subsidiaries or representatives.

so recovered shall be any uranium compound, Lessee shall pay to Lessors a royalty of four per cent (4%) of the 'Gross Value' of such compounds (as hereinafter defined). . . . (R. 81).

In short, the two royalties created by the Amended Audrey Lease were 8% of the amount received if crude ore should be sold, or 4% of the proceeds from the sale of yellowcake if yellowcake should be sold.

The language in Paragraph 3.2 provides as follows:

> Irrespective of the provisions set forth in paragraph 3.1 above, Lessors shall have the election and option to have royalties due them under the terms of this Lease calculated and paid upon the basis of eight percent (8%) of the fair market value at the mine portal of crude ore mined and produced from the Audrey Group. . . .

As is readily apparent from the language employed, Paragraph 3.2 did not create an additional, or new, royalty, but merely provided that the Audrey Lessors should have the election and option to have royalties "due them under the terms of this Lease" calculated and paid upon the basis of the fair market value of crude ore mined from the property. (R. 83) (emphasis supplied).

One more provision of the Amended Audrey Lease is critical to the issue before this Court. That provision is Paragraph 21.3, which provides as follows:

> Rio Algom Corporation shall, by reason of its interest in this Lease as described in Section II hereof, be excluded from any vote or decision of the Lessors relating to royalties and requiring unanimity of the Lessors, as provided for in Section 3.2 hereof. The unanimous vote or decision of the remaining Lessors other than Rio Algom Corporation

shall constitute unanimity for the purpose of the said Section 3.2.

The appellant, Rio, expressly agreed to be excluded from any "vote or decision" as to the exercise of any option regarding royalty payments.

PREFACE TO ARGUMENT

Rio has chosen to present its attack upon the trial court's approval[4/] of the Jimco-Audrey Settlement Stipulation through the use of five points. For the sake of convenience, these respondents will respond in turn to each of Rio's points in the "Argument" section of this brief.[5/]

[4/] Of course, judicial approval of settlements of this type is not required by the Utah Rules of Civil Procedure. Cf. Rule 23(e) of the Utah Rules of Civil Procedure. If it were not for the fact that judicial approval was made a condition precedent to the settlement in question, it would stand on its own footing and there would be no need to pass upon the trial court's action. Cf. Ham v. Marshall, 46 Ill. App. 2d 92, 196 N.E.2d 377 (1964). Judicial approval of the settlement was sought because the Jimco Respondents and the Audrey Respondents were informed that Rio would challenge any settlement between them.

[5/] It is the rather unique combination of events described in the preceding note which prompts Rio to "suggest" in its "Preface to Argument" that the Court draw an analogy to the standards governing review of a decision granting a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted in considering its various points and, accordingly, determine "not whether Audrey and Jimco have violated duties to Rio but whether . . . it has been demonstrated to a certainty that Rio could not prove a violation of duties. . . ." (Brief of App. at 16-17). Whatever the merits of this argument may be in the procedural context of this case, to employ the suggested analogy before determining what, if any, duties were owed to Rio is to put the cart before the horse. Because the Jimco Respondents and the Audrey

It must be constantly borne in mind, however, that this Court is confronted with a single issue; can Rio challenge the action taken by the Audrey Respondents in exercising the "election and option" granted exclusively to them in the Amended Audrey Lease (Paragraphs 3.2 and 21.3)? Said lease expressly "excluded" Rio from participating in the election and option because of a conflict of interest which arises out of the fact that Rio is the lessee of the properties and also holds a 25% interest in the lessor royalty. The following quotation contains language from the Amended Audrey Lease which notes this conflict and sets forth the royalty election scheme whereby Rio is excluded from any participation in the Audrey Lessors' decision:

> 3.2 Irrespective of the provisions set forth in paragraph 3.1 above, Lessors shall have the election and option to have royalties due them under the terms of this Lease calculated and paid upon the basis of eight per cent (8%) of the fair market value at the mine portal of crude ore mined and produced from the Audrey Group. In order to exercise such election Lessors must unanimously agree and notify Lessee in writing at least ninety

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Respondents did not, as a matter of law, violate any right of or duty to Rio in entering the settlement in question, as is demonstrated in the discussion that follows, the analogy is beside the point.

The basis for the further suggestion that the procedures employed by the trial court somehow violate due process of law is nothing more than rhetoric from a litigant dissatisfied with the result. Whether, as a matter of law, the Jimco and Audrey Respondents could settle upon the terms of the Settlement Stipulation without violating any duty owed Rio was fully litigated in the court below.

(90) days prior to the commencement of any calendar year of their election to require royalties to be calculated and paid in such manner. After having given such notice, the election so made shall remain in force and effect for the next ensuing calendar year, and from year to year thereafter, unless the Lessors should unanimously agree and notify Lessee in writing of their revocation of said election, which notification must be given at least ninety (90) days prior to the commencement of a calendar year and shall become effective at the commencement of, and remain in effect during the ensuing calendar year, and from year to year thereafter, unless another such notification of election is given at the time and in the manner as specified above. (Paragraph 3.2) (emphasis supplied).

Paragraph 21.3 provides:

21.3 Rio Algom Corporation shall, by reason of its interest in this Lease as described in Section II hereof, be excluded from any vote or decision of the Lessors relating to royalties and requiring unanimity of the Lessors, as provided for in Section 3.2 hereof. The unanimous vote or decision of the remaining Lessors other than Rio Algom Corporation shall constitute unanimity for the purpose of the said Section 3.2. (Emphasis supplied).

Paragraph 2.3 of the Amended Lease in pertinent part provides:

2.3 The parties hereto recognize and acknowledge that Rio Algom Corporation, in a capacity distinct from its capacity as one of the Lessors herein, on June 18, 1968, held a valid and subsisting option to acquire an assignment of the leasehold interest of Lessee in the Original Lease and the mining claims covered thereby, subject to the terms and conditions of the Option Agreement. Rio Algom Corporation duly exercised the option as of June 18, 1968. . .

Paragraph 21.2 of the Amended Lease further provides in pertinent part that:

21.2 At the time of execution of this Amended Lease, one of the Lessors, namely Rio Algom Corporation, has an interest in addition to its interest as one of the Lessors herein, as described in the recitals in Section II hereof. . .

The foregoing provisions direct attention to the inherent conflict of interest position in which Rio by contract has voluntarily placed itself. They expressly and unconditionally deny Rio any right to participate in the process of determining how royalties shall be calculated -- whether on the basis of a percentage of receipts from the sale of "yellowcake" (U_3O_8), or on the basis of a percentage of the fair market value of crude ore at the mine portal.

In the Settlement Stipulation, the Audrey Respondents agreed to "take in full satisfaction of all royalty obligations owed to them by both the Jimco Defendents and Rio Algom Corporation . . . under both the Audrey Lease and the Jimco Agreement, 5.5% of the total proceeds from the sale of yellowcake by Rio to Duke Power Company or any other purchaser." (R. 2242). The 5.5% figure was arrived at by taking 3% (75% of the Audrey royalty of 4%, if calculated on the basis of receipts from the sale of yellowcake,) and adding 2.5% which the Jimco Respondents agreed to give the Audrey Respondents out of the Jimco royalties for settling all differences between them.

The Settlement Stipulation also provided:

> 2. For the calendar year 1979, and all years thereafter, the Audrey Defendants hereby waive their right to the election of royalty payments based upon market value of crude ore as provided in paragraph 3.2 of the Audrey Lease, and agree to timely revoke their previous election under paragraph 3.2. Timely notice of the revocation of said election will be provided by the Audrey Defendants to Rio. (R. 2243).

The trial court approved the Settlement Stipulation, and in

its order ruled, in part:

> 2. The Court hereby rules that Rio has no standing under either the Audrey Lease or the Jimco Agreement, or any other theory of law or equity, to challenge or otherwise bar the effectuation and implementation of that certain Settlement Stipulation between the Audrey Defendants and the Jimco Defendants and that such Settlement Stipulation is not in violation of any duty owed to Rio by any of the defendants. (R. 1983).

The lower court also, consistent with its approval of the settlement, dismissed an amended complaint filed by Rio.

One of the arguments made by Rio, at pages 11-12 of its "Statement of Facts", against the Settlement Stipulation is as follows:

> Rio contends that this too directly violates its rights under the Audrey Lease because under that lease Rio always received twenty-five percent of the 'Audrey royalty pie', whereas under the new arrangement Rio will receive one percent of yellowcake while Audrey will receive 5.5 percent of yellowcake -- effectively reducing Rio's percentage of the so-called royalty pie from twenty-five percent to 15.3 percent.

A similar argument was made by counsel for Rio before the trial court. (R. 2190).

The argument put forth by Rio is fallacious. The Jimco Respondents have chosen to take 2.5% out if their "pie" and give that to the Audrey Respondents. The "Audrey royalty pie" and the percentage ownerships remain completely unchanged. Rio still has its 25% of the "Audrey royalty pie", and the Audrey Respondents have the other 75% of that "pie." The only change is that the Jimco Respondents have given part of their

"pie" to the Audrey Respondents, who now have parts from two different "pies".

Certainly, as Rio claims, if the Jimco Respondents give part of their royalty to the Audrey Respondents, the Audrey Respondents will now receive a greater royalty without Rio realizing any increase in its royalty. However, the Jimco Respondents now will receive a lesser royalty without Rio experiencing any decrease. Rio only plays one side of the numbers game when it laments that its share, when compared to the increased Audrey Respondents' share, produces a ratio less favorable to Rio than before the settlement between Audrey and Jimco. However, when Rio's share is compared to the now decreased share of the Jimco Respondents, the ratio is more favorable to Rio than before the settlement. The Jimco Respondents gave part of their share to the Audrey Respondents and nobody has given away any part of Rio's "pie". Rio's royalty simply hasn't been changed.

Rio has presented different faces in this matter. When it initiated this case, it characterized itself as just a "stakeholder" in the matter of calculating and paying royalties. It alleged in the Complaint, and still alleges whenever it tenders royalty payments to the trial court, that it cannot determine what its royalty obligations are and prays for declaratory relief. During the course of the proceeding in the trial court, however, Rio changed its position and argued for

an interpretation of the Amended Lease which, as illustrated by its "hypothetical" on page 8 of its brief, would completely wipe out the Jimco Respondents' royalties.

As lessee, Rio has had the exclusive right to mine, mill, and sell products of the mine. It has entered into a number of contracts with Duke Power Company under which it has sold, or committed by options, the entire output of the property, and granted to Duke certain rights to use the mill. It has sold yellowcake produced from ore taken out of the Lisbon mine at prices it considered fair and reasonable. Its interest as the lessee -- whose self-interest would favor small, or no royalties -- conflicts with its interest as the owner of a 25% lessor royalty -- which, of course, would involve a self-interest favoring high royalties.

Finally, Rio now seeks to exercise a veto power over an exclusive right expressly given by a written contract to the Audrey Respondents by asserting that the Audrey Respondents should be required to exercise the royalty election for the benefit of Rio. To so hold would be to find that the language of the lease which gives the Audrey Respondents the exclusive right to exercise the option does not mean what it states.

Rio filed this action claiming that the Court should determine what royalty should be paid the Jimco Respondents and the Audrey Respondents. These parties have now settled their differences and agreed to a particular division of the

royalties based upon a simple method of computation. They have adjusted, as they deemed to be in their best interests, the risks of this litigation as between themselves. The consideration received by the Audrey Respondents for their commitment to waive their election inures solely to their benefit. The consideration of the settlement agreement is a payment of money to be computed by reference to royalty percentage. Rio should not be permitted to block this agreement simply because it also wants something (a larger slice of the "pie").

Still further reason to deny Rio the power to which it asserts it is entitled, lies in the fact that the asserted power is a power to interfere in a legitimate settlement of conflicting claims. Such cannot be countenanced, especially in view of Rio's status as plaintiff in this interpleader action.

The voluntary settlement of disputes is undeniably favored by the law. See generally, 15A Am.Jur.2d Compromise and Settlement § 5 (1976). It is axiomatic that some, though less than all, of the parties to a lawsuit may agree to the settlement of disputes as between themselves. In this regard, the following observation, though made in a somewhat different context, is particularly pertinent:

> Adults having an interest in litigation have a personal right to negotiate and settle. Persons whose rights are affected by litigation, present or prospective, have a right to buy their peace by payment

> for a covenant or a release. Others having a similar interest cannot prevent a settlement by those willing to agree to it. This is so commonly done that it is amazing to find competent attorneys having any doubt about it. And it is so rare that a settlement is attacked, there is a paucity of authority on it.

Ham v. Marshall, 46 Ill. App. 2d 92, 196 N.E.2d 377, 379 (1964) (emphasis supplied).

In sum, to grant Rio the relief which it seeks is to grant it a role in decisions relating to royalties which is expressly denied to it by the terms of the Audrey Lease and is to impose upon the Audrey Respondents and the Jimco Respondents burdens which they did not and should not be required to assume. The trial court acted in accordance with the terms of the Audrey Lease and in furtherance of the well-settled policy of the law in approving the Jimco-Audrey Settlement Stipulation. Its decision should be affirmed. The following section of this brief considers in order each of the points asserted by the appellant.

ARGUMENT

I.

THE JIMCO-AUDREY SETTLEMENT STIPULATION DOES NOT CONSTITUTE AN AMENDMENT OR MODIFICATION OF ANY AGREEMENT TO WHICH RIO IS A PARTY BUT, RATHER, IS A TOTALLY SEPARATE AGREEMENT AND MUST BE JUDGED AS SUCH.

Rio devotes a substantial portion of its brief to the argument that the Jimco-Audrey Settlement Stipulation constitutes an amendment or modification of the Audrey Lease without

its consent and, therefore, similarly amends or modifies the Jimco Agreement. (Brief of App. at 17-22). Such, it contends, violates the fundamental principle of contract law that an agreement cannot be amended or modified without the consent of all of the parties thereto. The Jimco Respondents do not, of course, deny that an agreement cannot be so amended or modified. They fail to see, however, how Rio could so misconstrue the Settlement Stipulation.

The Jimco-Audrey Settlement Stipulation is simply a contract between the Jimco Respondents and the Audrey Respondents. 15A Am. Jur. 2d Compromise and Settlement § 7 (1976). It does not purport to be, was not intended to be, and is not an amendment or modification of any agreement to which Rio is a party. Indeed, the agreement expressly provides that is entered:

> without admission or determination of what is or has been the fair market value of crude ore, or whether there is or has been a market value for crude ore, or any other issue in this litigation. . . . (Emphasis supplied).

The agreement provides for the retroactive revocation, as to only the Audrey Respondents, of their previous election to receive royalty payments based upon the market value of crude ore as provided in Paragraph 3.2 of the Amended Audrey Lease. It provides for the payment to the Audrey Respondents of the 3% royalty on the proceeds from the sale of yellowcake to which they are entitled pursuant to the terms of the lease and

for the payment of an additional 2.5% royalty, determined on the same basis, from the amount to which the Jimco Respondents are entitled under the Jimco Agreement. Nothing therein affects the election as it bears upon the dispute between Rio and the Jimco Respondents with regard to the basis for the calculation of royalty payments for the years prior to the commencement of the 1979 calendar year.

From calendar year 1979 forward, the Audrey Respondents merely agree to waive their right to exercise the election provided for in Paragraph 3.2 of the Audrey Lease. That waiver is the result of an agreement separate and distinct from the Audrey Lease and the Jimco Agreement. It must be judged as such. It is a misconception to argue that it is invalid as an amendment or modification of either the Audrey Lease or the Jimco Agreement without Rio's consent. If the Audrey Respondents were to attempt to again invoke the election provided for in Paragraph 3.2 of the Audrey Lease, the Jimco Respondents would have a cause of action not on the Audrey Lease, nor on the Jimco Agreement but, rather, on the Settlement Stipulation.

Judged as a separate and distinct agreement, the Jimco-Audrey Settlement Stipulation offends nothing in the Audrey Lease and, therefore, can offend nothing in the Jimco Agreement by reason of the provision of that Agreement which is relied upon by Rio as incorporating the terms and provisions

of the Lease. Ooviously, the provision in Paragraph 21.3 of the Audrey Lease that the election provided for in Paragraph 3.2 thereof be made exclusively by the Audrey Respondents was inserted for the benefit of the Audrey Respondents. It is well-settled as a general principle that "[a] party may. . .waive a provision in a contract. . .which was inserted for his benefit." Oleg Cassini, Inc. v. Couture Coordinates, Inc., 297 F. Supp. 821, 830 (S.D.N.Y. 1969). No reason appears to deny a party the right to contract to do so.

When parties to an agreement confer upon one party a right which may be exercised exclusively by that party as that party sees fit, the exercise of that right does not constitute the amendment or modification of the agreement. No different result can be found where the party upon whom the right was conferred bargains with respect the exercise of its exclusive option. Assignments of rents, royalties or other benefits are common examples.

Rio cannot claim that it is prejudiced by the Jimco-Audrey Settlement Stipulation because it never had a right that could be impaired by that agreement. The Amended Lease denies Rio the right it now seeks to assert. Nor can Rio complain that the Audrey Respondents were the exclusive recipients of the settlement consideration. The consideration received by the Audrey Respondents for ending this action with respect to themselves is for the exercise of rights belonging exclusively to them.

Indeed, it is Rio who seeks to amend or modify the Audrey Lease without the consent of the Audrey Respondents. The aforementioned lease expressly states that Rio shall have no vote or decision as to the exercise of the very election at issue before this Court. The Audrey Respondents, by the terms of that lease, have the exclusive right to elect how the royalties provided for in that lease are to be computed. Rio by the terms of that agreement has no say whatsoever. Rio now asks this Court to grant it a veto power over the election which the Audrey Respondents have made. Rio seeks a power which the written agreement expressly denied to it for very good reasons. If this Court were to hold that the Audrey Respondents cannot exercise the Paragraph 3.2 election unless their action meets with the approval of Rio, then this Court would be rewriting the Audrey Lease to allow Rio a "vote or decision" in the election of computation methods. Rio seeks to regain by this appeal what it freely bargained away in the Audrey Lease.

II.

RIO, AS A PARTY TO THE AUDREY LEASE, HAS NO CLAIM AS A THIRD PARTY BENEFICIARY THEREUNDER AND, IN ANY EVENT, WOULD HAVE NO GREATER RIGHTS THEREUNDER AS SUCH THAN IT HAS AN AN ACTUAL PARTY.

Not content to argue merely that the Jimco-Audrey Settlement Stipulation is invalid as an attempt to amend or modify the Audrey Lease without its consent, Rio advances the further

argument that the Settlement Stipulation is invalid because Rio is also an "intended beneficiary" of the Lease. (Brief of App. at 22-23). The argument is not supported by authority.

The cases cited by Rio deal with the question of whether one not a party to an agreement can nonetheless enforce rights under it as a third party beneficiary. (See, Manning v. Wiscombe, 498 F.2d 1311 (10th Cir. 1974); Hammill v. Maryland Cas. Co., 209 F.2d 338 (10th Cir. 1954); Montgomery v. Rief, 15 Utah 495, 50 P.623 (1897)). These cases recognize that a third party may do so if he was intended to be benefited by the performance of the contract. See also Clark v. American Standard, Inc., ____ P.2d____ (Utah, August 8, 1978). Insofar as the Jimco Respondents have been able to ascertain, that is the only context in which the doctrine of intended beneficiaries has been employed. See, Clark v. American Standard, Inc., supra; Walker Bank & Trust Co. v. First Security Corp., 9 Utah 2d 21, 341 P.2d 944 (1959); Continental Bank & Trust Co. v. Stewart, 4 Utah 228, 291 P.2d 890 (1955).

Rio is a party to the Audrey Lease. It, therefore, has no claim as a third party beneficiary. Moreover, as previously noted, Rio was not intended to benefit from the Audrey Respondents' exercise of their exclusive right to determine the basis upon which royalties under the Audrey Lease were to be computed.

Just as important, even as a third party beneficiary, Rio

can have no greater rights under the Audrey Lease than it has as an actual party. Continental Bank & Trust Co. v. Stewart, supra. Rio's intended third party beneficiary argument gains it nothing.

III.

THE AUDREY RESPONDENTS OWED NO FIDUCIARY DUTY TO RIO WITH REGARD TO THE EXERCISE OF THEIR RIGHTS UNDER PARAGRAPHS 3.2 AND 21.3 OF THE AUDREY LEASE AND, THEREFORE, BREACHED NO SUCH DUTY IN ENTERING INTO THE JIMCO-AUDREY SETTLEMENT STIPULATION.

Rio at last gets to issue of the validity of the Jimco-Audrey Settlement Stipulation as an agreement separate and distinct from the Audrey Lease and the Jimco Agreement with its argument that the Audrey Respondents, in entering into the agreement, breached fiduciary duties owed to Rio. (Brief of App. at 23-26). Such duties, it argues, exist both by reason of the status of Rio and the Audrey Respondents as cotenants of the subject uranium claims and by reason of the Audrey Lease inasmuch as it vests the Audrey Respondents with certain exclusive rights, the exercise of which have some consequence to Rio. In entering into the Jimco-Audrey Settlement Stipulation, Rio claims the Audrey Respondents breached those duties in that they deprived Rio of participation in royalties computed in accordance with a previous election made by the Audrey Respondents.

That cotenants, as such, owe certain duties to each other cannot be doubted. For example, a cotenant, as such, lacks

authority to dispose of the common property and must account to his other cotenants if he does so. See e.g. Silver King Coalition Mines Co. v. Conkling Mining Co., 255 F.740 (8th Cir. 1919). Likewise, one cotenant will not be allowed to defeat the interest of his cotenants by purchasing the common property at a tax sale. Columbia Trust v. Nielson, 76 Utah 129, 287 P.926 (1930). However, as stated in Trout v. Harrell, 217 Ark. 670, 233 S.W.2d 233, 236 (1950):

> the mere relationship of cotenancy does not, ipso facto, create a confidential relationship in all dealings between the parties, even though such a relationship may exist in some matters. (Underscoring in original).

In short, cotenants, just by reason of their cotenancy, are not fiduciaries as to each other with respect to all that they do. See, e.g. Britton v. Green, 325 F.2d 377 (10th Cir. 1963); Pure Oil Co. v. Byrnes, 388 Ill. 26, 57 N.E.2d 356 (1944); 4A Powell on Real Property ¶605 at 619 (1978).

Hendrickson v. California Talc Co., 55 Cal. App.2d 279, 130 P.2d 806 (1943), relied upon by Rio for the proposition that the Audrey Respondents owe a fiduciary duty to Rio with respect to the exercise of their royalty election solely because of their status as cotenants with Rio does not stand for that proposition. In Hendrickson, a group of persons jointly located a mining claim. The location was invalid, however, because unbeknown to the group, the land upon which the claim was located was part of a larger tract of land which had been

temporarily withdrawn from location. The land was subsequently restored to the public domain and some of the members of the original group purported to again locate the claim, but did so only for themselves and to the exclusion of the others. The court held that the excluded members of the original group had an interest in the later claim because the parties had agreed jointly to enter upon a common undertaking and thus owed fiduciary duties to each other. The decision obviously did not and could not rest upon the basis of any cotenancy between the parties because the parties never concurrently shared the right to possession of a valid claim.

The fiduciary duty recognized by the Hendrickson case arose not from the status of the parties as cotenants but, rather, because of their common undertaking -- in other words, because of their agreement with each other. Cotenants clearly can contract with one another and, having done so, their rights must depend upon the contract. See, e.g. Lichtenberger v. Newhouse, 41 Utah 22, 123 P.624 (1924).

In this case, Rio contracted away any right which it might otherwise have had with respect to the election of the basis upon which royalties are to be computed under the Audrey Lease. It cannot persuasively be argued that the Audrey Respondents and Rio contracted for a relationship whereby the Audrey Respondents had to exercise the election as fiduciaries of Rio. Why expressly deny Rio any voice in the election if

Audrey must act for its benefit anyway? There is nothing in this contract which suggests Audrey agreed to act for the benefit of Rio. Indeed, the language of the agreement supports the opposite conclusion.

Rio also relies upon Britton v. Green, 325 F.2d 377 (10th Cir. 1963). This case holds that a cotenant with a right to possess the property owes fiduciary duties to its non-possessory cotenants. Reasoning that since such duties are charged to the cotenant in possession, Rio argues for application of the case to the opposite situation. Here Rio, not the Audrey Respondents is in possession of the property.

The Jimco Respondents, of course, agree with the holding in Britton that a lessee-cotenant, by virtue of the exclusive rights of possession necessarily granted to it, ordinarily owes fiduciary duties to its cotenants who are not entitled to possession of the property. Indeed, the Jimco Respondents have taken and continue to take the position that Rio owes such duties to them. A cotenant in possession, by reason of that status, can do many things to the property that will waste its value to the cotenant not entitled to possession. Because of this fact, when one cotenant has the right to possess certain property he is often charged by courts with a duty to not commit waste and to use the property in a manner that will mutually benefit himself and any cotenant not entitled to possession. The underlying reasons for this duty do

not, however, permit the extension of the duty to cotenants who are not entitled to possession.

A more fundamental flaw in Rio's argument for the extension of the Britton holding to the situation in the instant case lies in its failure to appreciate that the prerequisite to the existence of the fiduciary duty discussed in the case was a written undertaking on the part of one to act primarily for the benefit of another. See e.g., First Restatement of the Law of Torts § 874, Comment a (1939). It was clearly appropriate to recognize such an undertaking or obligation in Britton since the leases there expressly so provided.

> It is agreed that seller shall have active charge of the operation of said leasehold estate, and that said premises shall be operated to the mutual interest of all parties hereto as economically as good business judgment will warrant. It is further agreed that the parties hereto will observe the spirit as well as the strict letter of this contract and work at all times to the mutual advantage of each other in the management and operation and development of said lease. 325 F.2d at 381 n.2. (Emphasis supplied).

In contrast, recognition of an undertaking or obligation on the part of the Audrey Respondents to exercise their right to determine the basis upon which royalties are to be paid under the Audrey Lease in the best interests of Rio would be totally at odds with the purpose for and intent of Paragraph 21.3 of the Audrey Lease which expressly vests the royalty election solely in the Audrey Respondents and excludes Rio from any say in that election.

The facts of the instant case as they bear upon the question of fiduciary duty are more akin to Twentieth Century-Fox Film Corp. v. Teas, 286 F.2d 373 (5th Cir.), cert. denied, 368 U.S. 818 (1961) than they are to Britton. There, the defendants agreed to pay the plaintiff an 8-1/3% royalty on oil and gas produced from certain lots acquired from the plaintiff and 50% of the bonuses paid to them in consideration for leasing the same. The lots were leased to third parties who paid an 8-1/3% royalty directly to the plaintiff and who paid to the defendants an additional 11-2/3% royalty together with a "variable participating royalty." The primary issue was whether these additional "royalty" payments to the defendants, or a portion thereof, were actually "bonuses" to which the plaintiff was entitled. The court considered and rejected the plaintiff's contention that the defendants had a fiduciary duty to bargain for the apportionment of royalty and bonus in the best interests of the plaintiff, stating:

> The language of the contract so clearly distinguishes royalty from any other kind of benefits to be realized from a lease of the minerals, we conclude that it is clear that there could be no violation of the defendant's alleged [quasi-fiduciary] duty to act in good faith if it was able, as happened here, to exact an additional amount clearly recognized to be royalties.

286 F.2d at 375.

Here as in Teas the governing provisions of the parties' agreement afford no basis for the recognition of a fiduciary duty.

IV.

THE AUDREY RESPONDENTS, IN ENTERING INTO THE JIMCO-AUDREY SETTLEMENT STIPULATION, BREACHED NO IMPLIED COVENANT IN FAVOR OF RIO AS A MATTER OF LAW.

Rio's final argument going to the merits of the trial court's approval of the Jimco-Audrey Settlement Stipulation is that the Audrey Respondents, in entering into that agreement, breached certain implied covenants in favor of Rio -- specifically implied covenants to make its election of the basis upon which royalties are to be paid under the Audrey Lease in the best interests of both itself and Rio and to act in good faith. (Brief of App. at 27-31). In support of its argument, Rio relies heavily on its prior argument with respect to fiduciary duty.[6/] It should be readily apparent that this argument is but an attempt to advance under a new guise Rio's earlier argument that the Audrey Respondents breached fiduciary duties owed to Rio by entering into the settlement with the Jimco Respondents. This argument fails for basically the same reasons as the previous one.

"To imply a negative covenant in any written agreement normally requires that the court 'rewrite' the parties' agreement." So Good Potatoe Chip Co. v. Frito-Lay, Inc., 462 F.2d

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6/ For example, Rio discusses at length Webster v. Knop, 6 Utah 2d 273, 312 P.2d 557 (1957), which is essentially indistinguishable from Hendrickson v. California Talc Co., supra. See the discussion, supra, at 28-29.

239, 241 (8th Cir. 1972). Accordingly, "[i]mplied covenants are not favored in the law." Fraser Sweatman, Inc. v. Schreiber, 291 F. Supp. 276, 281 (E.D. Pa. 1968). As this court noted in Woodland Theatres, Inc. v. ABC Intermountain Theatres, Inc., 560 P.2d 700, 703 (Utah 1977):

> An implied covenant must rest entirely on the presumed intention of the parties as gathered from the terms as actually expressed in the written instrument itself, and it must appear that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it, and therefore omitted to do so; or it must appear that it is necessary to infer such a covenant in order to effectuate the full purpose of the contract as a whole as gathered from the written instrument. It is not enough to say that an implied covenant is necessary in order to make the contract fair, or that without such a covenant it would be improvident or unwise, or that the contract would operate unjustly. It must arise from the presumed intention of the parties as gathered from the instrument as a whole.
>
> . . . .
>
> An express covenant on a given subject matter excludes the possibility of an implied covenant of a different or contradictory nature.[7] (Citations omitted).

Moreover, "caution must be exercised when an implication of a . . . term would result in a breach." Smith v. Long, 478 P.2d 232 (Colo. App. 1978).

The Audrey Lease expressly provides that the Audrey

7/ See also Williams v. Safeway Stores, Inc., 198 Kan. 331, 424 P.2d 541 (1967); Duvanel v. Sinclair Ref. Co., 170 Kan. 483, 277 P.2d 88 (1951); Masciotra v. Harlon, 105 Cal. App.2d 376, 233 P.2d 586 (1951).

Respondents shall have the sole right to determine the basis upon which royalties under the Lease are to be paid. That right could not have been more clearly denied to Rio. To recognize the implied covenants for which Rio contends would be directly contrary to the evident purpose of the parties in so providing. Rio's contention in this regard must, therefore, be rejected.

The Audrey Respondents have not acted in bad faith. Rio receives the same share of the Audrey royalties as it would have done if the Audrey Respondents had not entered into the Settlement Stipulation. The Audrey Respondents waived their right of election, not to injure Rio, but to effect what they deemed to be a reasonable settlement of this lawsuit. Rio has no claim to any of the consideration paid for a settlement agreement in which it did not participate.

V.

THE TRIAL COURT'S ORDER DISMISSING RIO'S AMENDED COMPLAINT BASED UPON THE JIMCO-AUDREY SETTLEMENT STIPULATION SHOULD BE AFFIRMED.

Rio's final argument is that the trial court erred in dismissing its Amended Complaint, which alleged various causes of action claimed to arise by reason of the Jimco-Audrey Settlement Stipulation. The argument requires no extended discussion.

The trial court's action was based upon its earlier approval of the Settlement Stipulation. Rio's attacks upon that

agreement were fully briefed and argued by all parties as part of the disposition of the Motion to Approve the Settlement. The trial court found, as a matter of law, that by entering into the settlement agreement, no duty owed Rio was breached and, accordingly, approved the Settlement Stipulation. Inasmuch as the trial court found no violation of law occurred by the signing of the Stipulation, its dismissal of Rio's Amended Complaint which asserted causes of action based upon the signing of that document was proper.

CONCLUSION

The Jimco-Audrey Settlement Stipulation is a valid settlement of the disputes in this lawsuit as to the Audrey Respondents. Rio has no cause of action as a result of that settlement and no right to interfere with it. The Order of the trial court should be affirmed in all respects.

Respectfully submitted this 4th day of April, 1979.

Clinton D. Vernon
415 Kearns Building
Salt Lake City, Utah
Telephone: (801) 355-5033

VAN COTT, BAGLEY, CORNWALL & McCARTHY
Clifford L. Ashton
E. Scott Savage

141 East First South
Salt Lake City, Utah 84111
Telephone: (801) 532-3333

CERTIFICATE OF MAILING

This is to certify that copies of the foregoing Brief were mailed, postage prepaid, this 4th day of April, 1979, to each of the following:

James B. Lee, Esq.
Kent W. Winterholler, Esq.
Parsons, Behle & Latimer
79 South State Street
Salt Lake City, Utah 84111

Albert J. Colton, Esq.
Fabian & Clendenin
200 South Main Street, #800
Salt Lake City, Utah 84101

William G. Waldeck, Esq.
P. O. Box 2188
Grand Junction, Colorado 81501